UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BRISTOL INDUSTRIAL CORPORATION AND
C.O. SABINO CORPORATION (Single and Joint Employers)

Case 04–CA–148573
and 04–CA–153165

METROPOLITAN REGIONAL COUNCIL OF CARPENTERS,
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
SOUTHEASTERN PENNSYLVANIA, STATE OF DELAWARE AND
EASTERN SHORE OF MARYLAND

Elana Hollo, Esq.,
for the General Counsel.
Edward H. Wiley, Esq.,
for the Respondent.
Marc Gelman, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on February 16 and 17, 2016. The Union filed the first charge on March 20, 2015;[1] the first amended charge was filed on April 8 and the second amended charge on May 28. The Union filed the second charge on May 28, 2015. The General Counsel issued the consolidated complaint on August 4, 2015, and the amended consolidated complaint on January 27, 2016. The Respondents filed answers denying all material allegations.

On February 16, 2016, at the beginning of the trial, I granted the General Counsel's motion to further amend the complaint based on the reorganization of the Union.[2] (GC Exh. 2, 17.) The Respondents admit the changes in Union organization (paragraph 4) but continue to

[1] All dates are 2015 unless otherwise indicated.
[2] On February 3, 2016, the Metropolitan Regional Council of Carpenters was dissolved and merged into the Northeast Regional Council of Carpenters.

deny the appropriateness of the Unit and the Union's representation of the Respondents' employees (paragraph 8).

The complaints allege that the Respondents, a single or joint employer, violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) when they interrogated employees regarding Union activities and discharged two employees due to their protected concerted activity, having the police eject them from the work site.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Bristol Industrial Corporation (Bristol), a Delaware corporation, is a general contractor with an office in New Castle, Delaware. It purchased and received goods valued in excess of $50,000 directly from points outside the state of Delaware in the 12 months prior to February 2016.

Respondent C.O. Sabino Corporation (Sabino), a Delaware corporation, is a general contractor with an office in Philadelphia, Pennsylvania. It performed services valued in excess of $50,000 for entities outside the Commonwealth of Pennsylvania in the 12 months prior to February 2016.

The Respondents admit, and I find, that each company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Bristol is owned solely by Felicia Enuha, who is its sole officer. Sabino is owned solely by Valentine Verissimo, who is its sole officer. Enuha and Verissimo had a longstanding personal relationship. Although they were never married, they had, in the past, lived together and had five children together.

At the relevant time, Bristol had a contract to perform construction services at William F. Cooke, Jr., Elementary School in Hockessin, Delaware. Bristol also had a contract to perform construction services for the Wilmington Housing Authority (WHA). Bristol subcontracted much of that work to other companies. As a general contractor at WHA, Bristol subcontracted with 4 or 5 companies. They did not submit bids to Bristol, just estimates. One of the subcontractors Bristol used was Sabino. Enuha and Tom Berrian, then her senior project

manager/estimator, decided the appropriate monthly price for the job. They orally offered Sabino that monthly rate, and Verissimo agreed. Sabino subcontracted to serve as project manager for the Cooke site in February 2014; it subcontracted for the WHA site in September 2014 and in January 2015. (GC Exh. 3, 4, 5.) Despite the terms of the subcontracts, Bristol provided all materials used on the projects, and Sabino did not perform certain of the duties specified in the subcontracts. Bristol also owned two vehicles (a cargo van and a Silverado), either of which Verissimo (and other subcontractors) could use in the performance of his duties, e.g., delivering materials.[3] Ralph Shelby was Bristol's superintendent at the WHA job, overseeing the project onsite. Sabino served as Project Manager at Cooke; that job was supervised initially by Joe Yack.

Employment of Dougherty and Boroughs

Both projects were well underway when Bristol determined it needed additional manpower for WHA, though Cooke was winding down. Enuha consulted Shelby; he recommended Brian Dougherty, a carpenter with whom he had worked previously and who he felt was a good worker. Dougherty was scheduled for an interview; he brought a coworker, Thomas Boroughs, with him. Neither Enuha nor Shelby knew Boroughs or was familiar with his work. Enuha and Shelby interviewed Dougherty and had him complete an application and tax forms. Enuha hired Dougherty to work at the WHA site, but she advised Boroughs that she had no work for him at that time. Nonetheless, he also completed an application and tax forms. Enuha said she might call him later if she needed more help. Enuha told Dougherty that the job involved all tasks, and he said he could do anything. Bristol had no carpenters on board when Dougherty was hired, though there had been many carpenters (over 20) on and off, as needed, on the projects.

Dougherty began working at WHA in December 2014. Later in the month, he began working at Cooke, where he reported to foreman Joe Yack. Dougherty was told later on his first day there that Yack quit. Dougherty was asked to assume the duties of foreman at the Cooke job for Bristol.

Enuha later had Shelby call Boroughs to work at WHA in December 2014.

Enuha testified that she routinely loaned out employees to subcontractors. Both Dougherty and Boroughs were loaned to Sabino, as well as two other employees, Tyrone Fennell and Glenn Hayward. The arrangement was very informal with Sabino, as with other companies. Neither Dougherty nor Boroughs completed applications for Sabino. Bristol provided Sabino with Dougherty's and Boroughs' tax withholding forms. The employees received paychecks from both companies. (GC Exh. 10, 11, 14, 15.) Verissimo told Dougherty that the checks from Sabino were for WHA work, and checks from Bristol were for work at Cooke. The wages were different for work performed at each job site; Cooke was a prevailing wage project but WHA was not. For example, Dougherty worked 24 hours at the rate of $20 per hour at the WHA site during pay period December 13 – 19, 2014. He worked 8 hours, doing carpentry work at Cooke at the rate of $50.02 per hour, during pay period December 14 – 20, 2014. He worked exclusively at WHA at the rate of $20 per hour during pay period December 20 – 26, 2014. He

[3] Bristol paid for the gas, repairs, and insurance.

worked 32 hours, doing finishing work at the rate of $42 per hour, at Cooke during pay period December 28 – January 3, 2015. He worked 40 hours at Cooke during pay period January 4 – 10. Thereafter, until his termination, he worked at both sites. (GC Exh. 10 and 15.) Initially, on days when Dougherty worked at both sites, he worked more than 8 hours. Enuha then instructed him not to work past 3:30 at the WHA site, though 4:30 was the normal end time. (Tr. 149-50.)

Boroughs worked at WHA at the rate of $18.75 per hour during pay period December 20 – 26, 2014. That was at least $5 per hour than the standard rate for carpenters at that site. (Tr. 263-64.) He worked 40 hours at Cooke during pay period January 4 – 10, at the same rate as Dougherty. After February, Boroughs appears to have worked primarily at WHA at the rate of $18.75 per hour. (GC Exh, 14.)

Four other employees later joined Dougherty and Boroughs at the WHA site. Two were laborers, one a finisher, and one did plumbing/HVAC work. Other employees worked part-time for limited periods, including painters.

Bristol and Sabino were satisfied with the work performance of both Dougherty and Boroughs although there were some interpersonal disputes between Shelby and Dougherty at WHA. (Tr. 276, 305.) In fact, Enuha gave Dougherty significant additional responsibilities, including reviewing potential bids and obtaining new employees through Craigslist. (GC Exh. 28.) In February 2015, Shelby complained to Enuha about Dougherty. She told him he should not fire any more employees; he had already fired two employees, and she could not afford to lose the manpower. Shelby apparently became concerned that Enuha might fire him. He talked to Dougherty and Boroughs about joining a union to protect their jobs.

Employees' Union Contact

Dougherty called Sam Noel at Local 626. Dougherty, Boroughs, and Shelby met with Noel on February 25, 2015. Noel interviewed them about their skills, as none had completed Union apprenticeships. Noel was satisfied and the three signed cards authorizing the Union to represent them in dealing with both Bristol and Sabino. (GC Exh. 18, 19.)

Shelby went to Enuha sometime after that, and told her that Dougherty had contacted the Union, and that he had accompanied Dougherty, and Boroughs to a meeting with the Union when he felt his job was threatened.

The Union filed with the Board a petition to represent the full-time and part-time carpenters. (GC Exh. 7.) Notice of the petition was faxed to Bristol on March 11, 2015, at 9:59 am. (GC Exh. 9.) That notice advised that an election would be held on March 20, 2015.

Interrogations about union activities

According to Boroughs, on the morning of March 11, Verissimo asked him if he had signed a union card. (Tr. 225-26.) Boroughs said that later, Verissimo said "I don't want no fucking union on my job site," and "I don't want a union here." Verissimo did not specifically deny asking whether Boroughs signed a card; he did deny making the antiunion comments. (Tr. 282.) Further, Verissimo denied having any knowledge about the union on that date. I do not

credit that testimony. Based on their personal relationship, I find it likely that Enuha would have advised Verissimo of Shelby's confession as well as her receipt of the petition. Therefore, I credit Boroughs' testimony.

Enuha testified that, on March 12, 2015, she went to the WHA work site for a meeting with another subcontractor, Prado. She testified that, on her way, she received a call from Andrew Johnson, the owner of the site, who complained that Dougherty had insulted him. When Enuha arrived at the WHA site, Prado was not there, so she went to talk to Dougherty. She asked him why the tasks were not completed. He responded that "we are not doing drywall or finishing anymore," and then said he had told Shelby he was not going to do anything anymore. She left briefly to look for Prado, then returned and talked to Dougherty and Boroughs, who were on the stairs. She asked Dougherty about the issue with Johnson, which Dougherty denied. Dougherty then said "what if I did, he can't do anything because we're covered." Enuha felt his attitude might be related to what Shelby had told her, about going to the Union. She asked Dougherty if he was behaving as he was because he had signed something with the Union, and that he had to stop his behavior with Johnson as it was making her look bad and she needed the work. Enuha denied asking Boroughs about signing a union card.

Dougherty's version of the exchange was somewhat different. He testified that Enuha asked him if he knew anything about "this union thing." She said "someone's been speaking with the Union" and asked if it was he. Dougherty admitted that he had spoken to the union, and that Enuha asked "why he would do such a thing." He explained his reasons, and Enuha replied that she needed him to be honest with her so she could talk to her lawyer about her "next course of action." (Tr. 161-62.) Enuha explained why she did not see any benefit to the employees of belonging to the union, and saw no benefit for her company. Dougherty further testified that he did not refuse to do drywall work. Rather, Enuha said she wanted him to do the drywall work at the WHA site, but Dougherty felt the priority was dealing with the punch list at Cooke. After some discussion, he and Enuha agreed that other employees would do the WHA drywall while Dougherty went to Cooke to check out the punch list tasks. Boroughs testified that she asked him whether he had signed anything with the Union, and said she needed to trust him, and that the Union did not have anything to offer the employees. (Tr. 226-27.)

I generally credit Enuha's version of the conversations. Enuha did not want the Union at her company, and most likely did say that unions had nothing to offer the employees. However, her purpose at the WHA site that day was to address deficiencies with the work that had been performed. She also was concerned about Dougherty's attitude. He had been a good worker, and she had entrusted to him the responsibility for overseeing the project as well as other significant responsibilities in her company. His attitude had recently changed, as shown in his comments reported to her by Shelby and Johnson, as well as his comments directly to her. Enuha felt that Dougherty did not have the right to decide the project priorities or to tell her how to manage the projects. It was Dougherty's statement regarding "being covered" that prompted her question about signing something for the Union.

I also credit Enuha's testimony that she did not ask Boroughs whether he had signed a union card. As I have credited her version of the conversation, it made some sense for her to ask Dougherty, given his statement about "being covered." She had little discussion with Boroughs at that time, and had no reason to ask him.

Termination of Dougherty

Enuha testified that on March 17, she received a call from Lee Cherry, superintendent for the main contractor at Cooke, Whiting-Turner, who said there were some mistakes that he wanted Dougherty to look at. Enuha asked Verissimo to take Dougherty out to Cooke. The next day, Verissimo told her that Dougherty said he would do only framing, but no finishing or drywall. She then called Dougherty. He said it would take 2 days to complete the work, and she advised him it was important to complete it within that time. She then asked about his comments to Verissimo, and he repeated that he wouldn't do finishing or drywall. Enuha was concerned since she had hired him to do all necessary tasks, not just carpentry, and he had been doing so. She said she would come to the site to talk to him about this later. When she arrived, Dougherty had already gone for the day. Enuha returned to her office; she decided she could not tolerate Dougherty's behavior and drafted a termination letter. (GC Exh. 27.)

The next day, March 19, Enuha went to the WHA work site and handed Dougherty the termination letter. It included the following paragraph:

> The company hired you to perform carpentry, flooring, dry wall, cabinetry and other work. In fact, you have been doing satisfactory dry wall work for the company. However, on the last two occasions (3-12-15 at the WHA site and 3-18-15 at the Cooke site) when you have been told to do dry wall you have made it clear to myself, supervisors (Ralph Shelby) and (Valentine Versissimo) project manager at Cooke site and your employer at WHA, and other employees on the job sites that you would no longer do such work, irrespective of the company's request that you do so.

(GC Exh. 27.)

Enuha and Dougherty had no further contact after that date.

Dougherty noticed that the paycheck enclosed with his termination letter was incorrect. He approached Verissimo to ask about the amount, then began to leave the site. Verissimo stopped him, saying he may have been fired by Bristol but he was still on the clock for Sabino, so he returned to work. That evening, Verissimo called Dougherty at home and advised him that he was being laid off by Sabino for lack of work. The project was not completed, and there was work available of the same type that Dougherty had been performing. Sabino did not finish the Cooke project until April or May.

The next day, Dougherty went to the WHA work site to get his paycheck. Shelby was upset and called Verissimo, who directed Shelby to call the police.[4] The police talked to Shelby and Dougherty. Dougherty then drove his truck around the corner, and waited for Verissimo to arrive with his paycheck. The police did not charge Dougherty with any offense.

[4] Although this is alleged as a violation in the complaint, it was not briefed by the General Counsel. I assume this allegation has been abandoned by the General Counsel.

Termination of Boroughs

When Boroughs reported to work at the WHA site on March 20, Shelby advised him that he was being laid off for lack of carpentry work. The project was not finished, so there was still work available for Boroughs.

The first unfair labor practice charge was mailed to the Respondents on March 20, 2015.

On March 27, Verissimo asked both Dougherty and Boroughs to return to work. They were unavailable immediately, but reported to the WHA site on March 30. Verissimo then fired both employees for failing to bring their power tools – either drywall guns (in order to perform drywall tasks) or for failing to bring electric screwdrivers (necessary to access the worksite). Verissimo testified that Dougherty became upset and used profanity, so he called the police, who came and spoke to all three. Neither Dougherty nor Boroughs received a citation for any offense.

Dougherty and Boroughs testified that they had never brought their own power tools to work, and that until that date, Bristol had always provided the power tools. Enuha testified that she had provided the tools, and kept them in a locked gang box at the job sites, because they had been stolen in the past. (Tr. 274-77.) Shelby had the key for the gang box at WHA, and Dougherty had the key for the box at Cooke. I credit the testimony of Dougherty and Boroughs regarding the power tools and I find that they had previously used power tools provided by Bristol, not their own. Further, if, as Verissimo testified, all employees were required to bring power tools, and that an electric screwdriver was necessary in order to access the WHA site, then he and Shelby should have had their electric screwdrivers as well.

Analysis

Are the Respondents a Single Employer?

The Board has found that two nominally separate entities constitute a "single employer" when there is an absence of an arm's length relationship between them. *Hydrolines, Inc*., 305 NLRB 416, 417 (1991). The significance of finding two companies to be a "single employer" is that both are jointly and severally liable for the unfair practices committed and are responsible for remedying them.

In determining whether or not there is an arm's length relationship, the Board considers 4 factors: (1) the interrelationship of operations; (2) common management; (3) centralized control of labor relations and (4) common ownership, *Emsing's Supermarket, Inc.,* 284 NLRB 302, 304 (1987) enfd. 872 F.2d 1279, 1288-87 (7th Cir. 1989).[5]

No one of the four criteria is controlling and all four need not be present to warrant a single-employer finding. The Board has stressed that the first three criteria are more critical than

[5] The single employer concept is close but distinguishable from the concepts of "joint employer" and "alter-ego." The joint employer concept, for example, applies to situations in which more than one independent business concern has control over one or more projects. "Alter-ego" analysis is normally reserved for situations in which one entity has gone out of business and has been replaced by another.

common ownership, with particular emphasis on whether control of labor relations is centralized, as these tend to show operational integration. *Hydrolines, Inc*., supra.

Bristol awarded subcontracts to Sabino without competitive bidding, indeed, without any written bid. However, this was Bristol's routine practice, and not limited to subcontracts with Sabino. Rather, companies submitted estimates to Bristol. Additionally, Verissimo was free to use either of the work vehicles owned by Bristol. However, those vehicles were available to all subcontractors. Bristol loaned employees to subcontractors, including Sabino. That was a routine practice for Enuha, not just with Sabino. Therefore, I find these points immaterial. Nonetheless, due to the long term friendship between Enuha and Verissimo, the parties' professional relationship was very casual and thus problematic.

Factor (1): The operations of Bristol and Sabino were interrelated, at least on these projects. Bristol supplied materials and tools to Sabino, gratis, regardless of the subcontract terms. Enuha hired Brian Dougherty and Thomas Boroughs. While they were hired as Bristol employees, they were loaned to Sabino without their knowledge. Both started their jobs as Sabino employees at the WHA site, without having been interviewed or selected by Verissimo. Although Enuha testified that she hired Dougherty for Cooke as WHA had already been subcontracted out, Dougherty in fact reported initially to WHA. Dougherty and Boroughs reported their time on both sites to Enuha or Shelby. Enuha instructed Dougherty to stop work before the normal quitting time at WHA, so that he would not work more than 8 hours a day, when working at both Cooke and WHA on the same day. Paychecks for both companies were distributed by Enuha or Verissimo. There is no credible evidence of any action taken by Verissimo with regard to staffing or supervising the job, though Sabino was project manager, other than minimal action on March 19 and the incidents related to March 30. The record shows that Verissimo himself did little other than deliver materials. Dougherty did not deal with Verissimo regarding Cooke, but with Enuha and Lee Cherry, superintendent for the general contractor, Whiting-Turner. (GC Exh. 23, 24, 25, 26.)

Factor (2): Enuha substantially managed Sabino, as well as Bristol. The only management action that Verissimo seemed to take was to issue the Sabino paychecks. He was not involved in overseeing Cooke or making progress reports, though Sabino was the project manager.

Factor (3): Felicia Enuha, the sole owner of Bristol, substantially controlled the labor relations of both companies. This is evidenced by the fact that she hired Dougherty and Boroughs, unilaterally loaned them to Sabino, and gave Sabino copies of their tax withholding forms. She fired Brian Dougherty for conduct occurring at WHA and Cooke Elementary School. After Enuha fired Dougherty and laid off Boroughs, on March 19 and 20, neither of them worked for Sabino, until Verissimo called them on March 27.

Factor (4): There is no common ownership of Bristol and Sabino. However, given the lack of arm's-length dealings between the two companies, I find it unnecessary, as the General Counsel suggests, to distinguish this case from *US Reinforcing*, 350 NLRB 404 (2007) in which the Board appeared to consider the absence of a marriage license determinative of whether two companies were alter-egos. I find that Bristol and Sabino are a single employer even in the absence of common ownership.

I find that Bristol Industrial Corporation and C. O. Sabino are a "single employer" and are jointly and severally liable for the unfair labor practices in this case.

Did the Respondents violate the Act by asking employees about union activities?

The test for determining whether questioning of an employee violates Section 8(a)(1) of the Act is whether it would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Grand Canyon University,* 362 NLRB No. 13 slip op. 1 (2015), citing *Hanes Hosiery, Inc.,* 219 NLRB 338, 338 (1975). Circumstances considered in evaluating the tendency to interfere include (1) the background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of the interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984).

I have credited Boroughs' testimony that Verissimo asked him whether he had signed a union card. However, I do not find the circumstances to be coercive. While Dougherty was not an open union supporter, there were only 2 carpenters employed at the time. Dougherty and Boroughs signed authorization cards for representation with Bristol and Sabino. The employees were aware that the Union was filing a representation petition and that the employers would be notified. Verissimo simply asked the question, in the workplace, not in the office or in a conference room. There were no threats associated with the question, nor was it asked in a hostile manner. Verissimo's subsequent behavior cannot retroactively make the question he asked earlier in the day coercive.

Enuha admitted asking Dougherty about signing a union card. I find that she also asked about his reasons for contacting the Union. I have credited her testimony that she did not ask Boroughs about the Union.

I find that the circumstances surrounding Enuha's questioning of Dougherty were not coercive. She was the owner of Bristol, but she and Dougherty testified that she treated him like a son. Dougherty was not at all fearful or intimidated by Enuha; on the contrary, he seemed to behave like a peer. Dougherty had not openly demonstrated support for the Union when Enuha asked him these questions, but, as stated above, he was aware that Enuha would have been advised of the representation petition. Further, although Enuha expressed her opinion that the union would not be helpful to the employees, she was entitled to express that opinion, and it was not a threat. Finally, the conversation occurred at the job site, not in an office or conference room.

I find that Respondents, by Felicia Enuha and Valentine Verissimo, did not violate Section 8(a)(1) when they asked employees about union activities.

This allegation is dismissed.

Did Respondents violate the Act when they terminated and laid off Dougherty and laid off Boroughs on March 20, 2015?

The legal standard for evaluating whether a motive-based adverse employment action violates Section 8(a)(3) and (1) of the Act is set forth in *Wright Line,* 251 NLRB 1083, 1089

(1980), enfd. 662 F.2d 899 30 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395 (1983) (approving the *Wright Line* analysis). Under *Wright Line,* the elements generally required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employee's union or protected activity. *Consolidated Bus Transit, Inc.,* at 1066; *Pro-Spec Painting,* 339 NLRB at 949; *Williamette Industries*, 341 NLRB 560, 563 (2004).

Both Dougherty and Boroughs had engaged in protected concerted activity, having contacted the Union and signed authorization cards. Enuha was aware of that activity. Shelby had advised Enuha of their February 25 meeting with the Union. Further, the Union's representation petition had been faxed by the Board to Enuha on March 11.

Enuha made some mild antiunion comments to Dougherty and Boroughs, to the effect that the Union had nothing to offer the employees. While she is entitled to express her sentiments against the Union, it does show that she had antiunion animus.

Enuha then fired Dougherty for insubordination on March 19. On March 20, Enuha had Shelby tell Boroughs he was being laid off for lack of work. Verissimo laid off Dougherty for lack of work.

With these circumstances and the timing of the actions, the General Counsel has met his burden.

I find that Respondent Bristol has established that it would have terminated Dougherty absent his protected activity.

Dougherty was fired for insubordination. I credit Enuha's testimony regarding the reports she had received from Shelby and Verissimo regarding Dougherty's refusal to do drywall work. I also credit her testimony that Dougherty repeated that refusal directly to her.

The timing of the action relative to the union activity must be noted. However, Dougherty's attitude clearly changed after he met with the Union, and seemed to worsen as the date for the election neared. This is not unheard of, especially in a circumstance such as this, where he knew the Union would win. Moreover, Enuha relied heavily on Dougherty's expertise, and he seemed to presume that he had more authority than he did. Toward the end of his employment, Dougherty contradicted Enuha and refused to perform duties he was hired to do. While Enuha valued Dougherty, she could not tolerate his attitude and insubordination. As to Enuha's motivation, it must be noted that no action was taken against Shelby, who had volunteered to Enuha that the group had met with the Union.

I find that Respondents have not established that they would have laid off Dougherty or Boroughs absent their protected activity.

After Dougherty was fired by Bristol, he was laid off by Sabino, ostensibly for lack of work. However, there was work that needed to be performed, of the same type that he had been performing.

Boroughs was not fired. Shelby told Boroughs he was laid off when he reported to WHA to work, as there was insufficient work for him to perform at that site. That was not true; there was sufficient work for Boroughs to perform, of the same type he had been performing.

This allegation is dismissed as to the termination of Dougherty by Bristol.

I find that Respondents violated Section 8(a)(3) and (1) of the Act when they laid off Dougherty and Boroughs on March 20.

Did Respondent Sabino violate the Act when it terminated Dougherty and Boroughs?

Both Dougherty and Boroughs had engaged in protected concerted activity, having contacted the Union and signed authorization cards. Verissimo was aware of that activity. Shelby had advised Enuha of their February 25 meeting with the Union. Because of their close personal relationship, I believe Enuha advised Verissimo of that report. Further, the Union's representation petition had been faxed by the Board to Enuha on March 11. I believe that she advised Verissimo of that petition, and the fact that a Board election would be held on March 20. Verissimo demonstrated antiunion animus in his March 11 conversation with Boroughs. Both employees had been out of work since March 20. After reporting to work on March 30, both employees were immediately terminated by Verissimo.

Verissimo testified that he terminated Dougherty and Boroughs for failing to bring their power tools to work. Without those tools, they were unable to access the site or do the dry wall work he assigned them to perform. Dougherty and Boroughs testified that they had never brought power tools to work before, either electric screwdrivers or drywall guns, but had always used power tools provided by Bristol. Enuha testified that Bristol kept tools, including dry wall guns, in a locked gang box at each job site. Those tools were stamped "Bristol." I find that Verissimo's stated reason for the terminations is pretextual.

Verissimo called the police when he terminated Dougherty and Boroughs on March 30. That action was based on Dougherty's use of profanity. While that may have been inappropriate, Verissimo did not provide justification for police involvement. I can only conclude that the police were called due to the employees' protected concerted activity.

I find, therefore, that the Respondent Sabino violated Section 8(a)(3) and (1) by discharging Brian Dougherty and Thomas Boroughs and calling the police at the time of discharge.

Conclusions of Law

1. Respondents, a single employer, violated Section 8(a)(3) and (1) of the Act by laying off Brian Dougherty and Thomas Boroughs on March 20, 2015.

2. Respondents, a single employer, violated Section 8(a)(3) and (1) of the Act by discharging Brian Dougherty and Thomas Boroughs on March 30, 2015, and by calling the police at the time of discharge because of their union activities.

3. Respondents, a single employer, did not otherwise violate the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Issuance of a "Gissel" Bargaining Order

The Union petitioned the Board to represent a unit of full-time and regular part-time carpenters. The uncontradicted evidence established that this is an appropriate bargaining unit. Although the Respondents did not admit the unit was appropriate, they did not present any evidence to show it was not. The Union found that Dougherty, Boroughs, and Shelby were qualified carpenters. The record is not clear that Shelby, in fact, performed carpentry work for either Respondent. However, the record establishes that there were no other carpenters working for Respondents as of March 10, 2015. Felicia Enuha conceded that Dougherty was a carpenter (Tr. 252), and, since she paid Boroughs the same wage rates as Dougherty for carpentry and finishing work on the Cooke site, I conclude Boroughs was doing carpentry work as well. Furthermore, Verissimo, when testifying before a Board agent under oath, stated that Dougherty and Boroughs did carpentry and drywall work. (Tr. 301.)

Dougherty and Boroughs were Respondents' only carpenters at the time, often working side by side, and there is no evidence that their duties overlapped with any other of Respondents' employees, or had any common interests with any other of Respondents' employees. By March 11, 2015, when the Union demanded recognition, it had achieved majority status in that it had signed authorization cards from both members of the bargaining unit.[6]

The U.S. Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 610 (1969) identified two categories of employer misconduct that warrant the imposition of a bargaining order. I will treat this as a "Category II" case. Those are cases in which the unfair labor practices are less extraordinary and marked by less pervasive practices than "Category I" cases, which nonetheless still have a tendency to undermine majority strength and impede the election process.

In determining whether a remedial bargaining order is warranted in a "Category II" case, the Board considers the seriousness of the employer's unfair labor practices and their pervasiveness, the size of the bargaining unit, the number of employees affected by the unfair labor practices, the extent of the dissemination of those unfair labor practices and the position of

[6] Or 3 of the 3 members of the Unit if Ralph Shelby was a unit member.

the person(s) committing the unfair labor practices. See *Novelis Corp.,* 364 NLRB No. 101 (August 26, 2016) and cases cited therein.

The facts in this case warrant a bargaining order. The unfair labor practices were about as serious as they can get—discharge of the entire bargaining unit. The unfair labor practices were committed by Respondents' highest ranking officials. If an election were held at some future date, it is likely that any employees other than Dougherty and Boroughs would be aware that Respondent fired the entire unit soon after receiving a representation petition.[7] Moreover, Dougherty and Boroughs would reasonably fear that Respondents would find another pretext to discharge them again. They would reasonably be less fearful if they had the Union as their bargaining representative to intercede with Respondents. Thus, I find that reinstatement of Dougherty and Boroughs and a notice posting would be insufficient to dispel the coercive atmosphere that Respondents created.

The Respondents, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

The Respondents shall compensate Brian Dougherty and Thomas Boroughs for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondents shall compensate Brian Dougherty and Thomas Boroughs for the adverse tax consequences, if any, of receiving lump sum backpay awards. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014). In accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 4 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondents shall bargain with the Charging Party Union as the exclusive bargaining representative of its full-time and part-time carpenters.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [8]

[7] I would note, however, that the Board's established practice is to evaluate the appropriateness of a bargaining order at the time the unfair labor practices were committed. *Novelis,* supra, slip opinion at page 6, n. 17.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Bristol Industrial Corporation and C.O. Sabino Corporation, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization or for engaging in other protected concerted activities.

(b) Refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of all its full-time and regular part-time carpenters.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective bargaining representative, retroactive to March 10, 2015, of all its full-time and regular part-time carpenters.

(b) Within 14 days from the date of the Board's Order, offer Brian Dougherty and Thomas Boroughs full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Brian Dougherty and Thomas Boroughs whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Make Brian Dougherty and Thomas Boroughs whole for any search-for-work and interim employment expenses suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(e) Compensate Brian Dougherty and Thomas Boroughs for the adverse tax consequences, if any, of receiving a lump sum backpay award and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

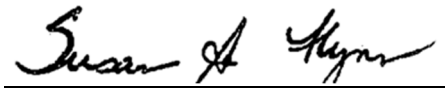
(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify Brian Dougherty and Thomas Boroughs in writing that this has been done and that the discharge will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its New Castle, Delaware, and Philadelphia, Pennsylvania facilities copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 2, 2016



Susan A. Flynn
Administrative Law Judge

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Northeast Regional Council of Carpenters or any other union or for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Brian Dougherty and Thomas Boroughs full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brian Dougherty and Thomas Boroughs whole for any loss of earnings, search-for-work and interim employment expenses and other benefits resulting from their discharges, plus interest compounded daily.

WE WILL compensate Brian Dougherty and Thomas Boroughs for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 21 days of the date the amount of backpay is fixed, file a report with the Regional Director for Region 4 allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Brian Dougherty and Thomas Boroughs, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

BRISTOL INDUSTRIAL CORPORATION
And C.O. SABINO CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-148573 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.